Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STEWART A. FELDMAN and MARLA B. MATZ, D.D.S.,

Petitioners,

vs.

NIEL MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the bankruptcy court violated Petitioners' rights under the Fifth and Sixth Amendments by usurping the criminal contempt jurisdiction vested exclusively in the district court in order to assess criminal contempt sanctions against them.

2. Whether the lower courts may properly award noncompensatory, "coercive" sanctions to an opposing litigant instead of the court.

3. Whether the lower courts violated 28 U.S.C. § 2007(a) and the Texas Constitution by attempting to use their contempt power to enforce collection of a monetary judgment.

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

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No. _____

SUPREME COURT OF THE UNITED STATES
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STEWART A. FELDMAN and MARLA B. MATZ, D.D.S.,

Petitioners,

vs.

NIEL MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

A writ of certiorari is respectfully sought to review the judgment and *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit, which affirmed contempt sanctions entered by the district and bankruptcy courts.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 10, 1997. (Apx. 1) Neither the district court nor the bankruptcy court prepared formal opinions, but their orders are attached hereto at Apx. 3-30.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 10, 1997. (Apx. 1) A timely petition for rehearing and suggestion for rehearing en banc was denied on January 29, 1998. (Apx. 31) On April 21, 1998, Justice William K. Suter extended the time within which to file a petition for a writ of certiorari to and including June 26, 1998. (Apx. 33) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

28 U.S.C. § 2007(a):

> A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance

with the procedure applicable in such State.

TEX. CONST. art. 1, § 18:

No person shall ever be imprisoned for debt.

STATEMENT OF THE CASE

The central issue before the Court is whether $200,000.00+ of *per diem* contempt sanctions made payable to an opposing litigant should be characterized as "coercive civil sanctions" or "criminal contempt sanctions" within the framework announced in *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). In *Bagwell*, this Court suggested that the line between petty and serious (*i.e.*, criminal) contempt fines may lie between $5,000.00 and $10,000.00, which is 20 times less than the penalties at issue here. *Bagwell* at 838, note 5. If these contempts are criminal, the consequence of the lower courts' rulings is an unchecked violation of Petitioners' Fifth and Sixth Amendment rights, together with a significant encroachment by the bankruptcy court into the district court's criminal subject matter jurisdiction. If the decisions of the lower courts are allowed to stand, contempt sanctions which should be deemed "criminal" under *Bagwell* may be freely assessed, without adequate constitutional protections, under the guise of "coercive civil sanctions." Furthermore, those criminal contempt sanctions may be assessed by federal courts which have never possessed criminal contempt jurisdiction.

In its *per curiam* opinion dated December 10, 1997, the Fifth Circuit affirmed the district court's January 14, 1997 order, whereby the district court assessed over $200,000.00 in "coercive" *per diem* sanctions against Petitioners, Stewart A. Feldman ("Feldman") and Marla B. Matz, D.D.S. ("Matz"), which were made payable to Respondent, Niel C.

Morgan ("Morgan"). (Apx. 1, 3) The district court's January 14, 1997 order is the culmination and consolidation of previous actions taken by the district and bankruptcy courts, as detailed below. The Fifth Circuit refused to consider the propriety of the bankruptcy court's conduct in reaching it affirmance. However, because the bankruptcy court engaged in a clear usurpation of the district court's criminal contempt power, the January 14, 1997 order (and its predecessors) are rendered void and fully assailable in this Court. A brief reiteration of the circumstances confronting the lower courts is set forth below.

A. The Real Estate Partnerships.

Feldman, Morgan and Roy I. Bennion ("Bennion") were involved in various real estate ventures beginning in the late 1980's and early 1990's. In particular, Feldman and Bennion were partners in several real estate partnerships which owned four valuable parcels of debt-free commercial realty. Additionally, Feldman and Bennion were partners in two limited partnerships: (i) Vickery Woods Associates; and (ii) Chelan Associates. In each, Bennion (through a corporation wholly owned by Bennion) was the general partner and Feldman was the sole limited partner. Morgan, although not a partner, was involved as a co-owner with the partnerships in two of the tracts.

B. Intermarque.

Intermarque Automotive Products, Inc. ("Intermarque") was a Texas corporation formed by Feldman, Bennion and Morgan in 1989. Feldman was a member of Intermarque's board of directors and also served at various times as its president, executive vice president and chief

operating officer. In January 1992, a serious management dispute arose within Intermarque which turned litigious when Morgan caused Intermarque to file a state court lawsuit styled *Intermarque Automotive Products, Inc. v. Stewart A. Feldman* under Cause No. 92-07396 in the 125th Civil District Court of Harris County, Texas ("Intermarque Suit"). Through a myriad of counterclaims and third-party claims, Feldman, Bennion and Morgan all became individually embroiled in the Intermarque Suit on issues ranging from operation of the automotive company, to claims arising from the real estate ventures. The Intermarque Suit was eventually severed into four distinct state court actions, two of which have relevance to this matter:

Main Case: Cause No. 92-07396 styled *Intermarque Automotive Products, Inc. v. Stewart A. Feldman* in the 125th Civil District Court of Harris County, Texas (involved claims among the parties which arose from the operation of Intermarque).

"A" Case: Cause No. 92-07396-A styled *Intermarque Automotive Products, Inc. v. Stewart A. Feldman* in the 125th Civil District Court of Harris County, Texas (involved partnership claims between Feldman and Bennion arising in connection with the real estate ventures).

C. The Intermarque Main Case, Bankruptcy & Sanctions.

Feldman prevailed on his claims in the Intermarque Main Case which resulted in a $250,000.00 net judgment in his favor against the company. In order to avoid the corpo-

rate judgment, on July 16, 1993 Morgan and Bennion caused Intermarque to file a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code under Case No. 93-45464-H3-11 styled *In re Intermarque Automotive Products, Inc.* ("Intermarque Bankruptcy"). Simultaneously, Intermarque initiated an adversary proceeding under Case No. 93-4437 styled *Intermarque Automotive Products, Inc. v. Stewart A. Feldman* which was simply a removal of the Intermarque Main Case to the bankruptcy court ("Adversary Proceeding").

In connection with the confirmation of Intermarque's plan of reorganization, an injunction was entered which prohibited Feldman from asserting certain claims which the bankruptcy court ruled belonged to Intermarque's bankruptcy estate. As reflected in its order dated February 1, 1996, the bankruptcy court ruled that Feldman violated the injunction (by pursuing claims in another of the Intermarque matters) and assessed *compensatory* sanctions payable to Morgan of $10,950.00 ("Injunction Sanction"). (Apx. 9)

When Feldman did not timely pay the Injunction Sanction, a contempt hearing was held and on May 19, 1996, the bankruptcy court signed a further order which: (i) affirmed the $10,950.00 Injunction Sanction; (ii) added an additional $1,000.00 *compensatory* sanction payable to Morgan; and (iii) added *"coercive"* daily sanctions which quickly escalated to $1,000.00 per day, *also payable to Morgan*, for each day that ***"any sanction remains unpaid."*** (Apx. 12) (emphasis added) On June 3, 1996, the bankruptcy court signed an amended order which left the foregoing sanction scheme intact, but established, *inter alia,* dates certain for payment and commencement of the *per diem* sanctions. (Apx. 15-16) The foregoing sanctions will hereinafter be collectively referred to as the "Intermarque

Sanctions."[1]

D. The "A" Case, MBM Bankruptcies & Sanctions.

The "A" Case dealt with various partnership claims and a related arbitration proceeding concerning the realty at issue. Initially, the realty was owned by Bennion and Feldman through their partnerships. However, in March 1993, Feldman transferred his interests in the partnerships to his wife, Marla Matz, as part of an overall marital property agreement.

MBM Investment Real Estate, L.P. ("MBM") is the reconstituted successor to the limited partnership formerly known as Chelan Associates, which had dissolved under state law. Matz Real Estate Services, Inc. ("MRES") is the general partner in MBM. More than two years after the Feldman-Matz partition agreement, on October 13, 1995 MBM and MRES filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code. The cases were styled as follows: Case No. 95-47986 styled *In re Matz Real Estate Services, Inc.* ("MRES Bankruptcy"); and Case No. 95-47987 styled *In re MBM Investment Real Estate, L.P.* ("MBM Bankruptcy") (collectively the "MBM Bankruptcies"). The purpose of the MBM Bankruptcies was to stave-off confirmation of a receiver's sale of the real estate assets at issue in the Intermarque "A" Case. To this end, the Intermarque "A" Case was also removed to federal court.

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[1] For clarity, the "Intermarque Sanctions" consist of: (i) the $10,950.00 Injunction Sanction (Apx. 9); (ii) the $1,000.00 additional compensatory sanction (Apx. 12, 15); and the *per diem* sanctions (Apx. 12, 15).

Upon emergency motions brought by Morgan, within days of their filing the MBM Bankruptcies were dismissed and the Intermarque "A" Case was remanded to state court. Contemporaneously with the dismissals and remand, the bankruptcy court indicated that the MBM Bankruptcies had been commenced in bad faith and therefore, the bankruptcy court retained jurisdiction over sanctions matters related to the bad faith filings. MBM and MRES were in bankruptcy for only 18 days when the two Chapter 11 filings were dismissed, the "A" Case was remanded to state court and a finding was made that the bankruptcies were commenced in bad faith.

During the subsequent seven months of bankruptcy court hearings on the improper bankruptcy filings, Morgan continued his involvement and sought discovery of various documents via subpoena. On March 29, 1996, a hearing was held in connection with Feldman's and Matz' alleged failure to comply with a Morgan subpoena. As a result of that hearing, the bankruptcy court entered an order which provided the following: (i) Feldman and Matz would produce various documents by a date certain; and (ii) Feldman and Matz were jointly and severally assessed sanctions totaling $8,000.00 (*i.e.*, $1,000.00 *compensatory* sanctions for attorney's fees + $3,000.00 *punitive* sanctions, for a total of $4,000.00 per case or $8,000.00 in aggregate) ("Discovery Sanction"). (Apx. 19) Additionally, the bankruptcy court ordered that if the document production and/or sanction payment was not timely made, that all pleadings filed on behalf of Matz and Feldman in the ongoing bankruptcy bad faith matter would be stricken and that Matz and Feldman would not be allowed to testify on their own behalf. (Apx. 20)

Although Feldman and Matz complied with their

discovery obligations, the $8,000.00 Discovery Sanction was not paid within the time frame set by the bankruptcy court, which resulted in the entry of a May 13, 1996 "Judgment of Civil Contempt." (Apx. 22) In this contempt judgment, the bankruptcy court: (i) affirmed the $8,000.00 Discovery Sanction; (ii) assessed an additional $1,000.00 *compensatory* sanction payable to Morgan (*i.e.*, $500.00 per bankruptcy case); and (iii) assessed an additional $1,000.00 per day *"coercive"* sanction (*i.e.*, $500.00 per bankruptcy case) also *payable to Morgan,* commencing May 20, 1996 for each day that ***"any sanction remains unpaid."*** (Apx. 22) (emphasis added) The foregoing sanctions shall hereinafter be collectively referred to as the "MBM Sanctions."[2] Additionally, on May 14, 1996, the bankruptcy court struck Petitioners' pleadings in the bad faith matter and excluded their testimony. (Apx. 25)

E. Consolidation in the District Court.

On August 6, 1996, the bankruptcy referral was withdrawn and all sanction matters were consolidated into Case No. H-96-2849 styled *In re Stewart Feldman and Marla Matz Sanctions Matters* in the district court. Out of this proceeding arose the district court's January 14, 1997 order (Apx. 3) which forms the basis of this petition.

F. Conduct of Feldman & Matz.

There is no evidence in the record of any other

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[2] For clarity, the "MBM Sanctions" consist of: (i) the $8,000.00 Discovery Sanction (Apx. 19); (ii) the additional $1,000.00 compensatory sanction (Apx. 22); and (iii) the *per diem* sanctions (Apx. 22).

violations of the Intermarque injunction by Feldman, or of other discovery problems attributable to either Matz or Feldman in connection with the MBM Bankruptcies, other than the conduct which formed the basis of the original Injunction and Discovery Sanctions. Additionally, there is no evidence of any further contemptible or sanctionable conduct by Feldman or Matz before either the bankruptcy court or the district court. The only wrongful conduct underlying the bankruptcy court's *per diem* sanctions is Feldman's and Matz' failure to timely pay the Injunction and Discovery Sanctions. To date, Feldman and Matz have paid $18,950.00 to Morgan, which exceeds the total compensatory sanctions assessed.

REASONS FOR GRANTING THE WRIT

Petitioners' writ should be granted because the Fifth Circuit's *per curiam* opinion and its implicit holding is in conflict with other Fifth Circuit decisions, as well as decisions of other Circuits on the same important matter. Additionally, the Fifth Circuit has sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Finally, the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. THE FIFTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S AWARD OF *PER DIEM* SANCTIONS BECAUSE THE AWARD IS VOID AND UNENFORCEABLE.

A. The Underlying Bankruptcy Court Orders Are Void for Want of Due Process.

(1) The Leading Case - *United Mine Workers v. Bagwell.*

The principle issue before this court will turn on whether the *per diem* sanctions assessed against Feldman and Matz constitute serious criminal sanctions, such as to warrant Fifth and Sixth Amendment criminal due process protection. The leading case is *United Mine Workers v. Bagwell,* 512 U.S. 821 (1994). In *Bagwell*, the United Mine Workers labor union was enjoined from engaging in certain strike-related activities. Upon violation of the injunction, the union was sanctioned $642,000.00 and warned by the trial court that further violations of the injunction would result in sanctions of $20,000.00 for each non-violent infraction and $100,00.00 for each violent infraction. *Id.* at 824. In subsequent non-jury hearings, the union was assessed in excess of $64,000,000.00 (which was ultimately reduced to $52,000,000.00 pursuant to a settlement) as sanctions for both violent and non-violent violations. In *Bagwell,* this Court framed the controlling issue as follows:

> [W]hether these fines, despite their noncompensatory character, are coercive civil or criminal sanctions.

Id. at 834. This Court ultimately overturned the sanctions, holding that they were not coercive civil sanctions, but instead, constituted serious criminal sanctions for which criminal due process protections attached and were not observed. In the case at bar, this Court is presented with precisely the same issue and should reach precisely the same conclusion. A *Bagwell* analysis of the instant case is set forth below.

(2) Classification of Contempt Sanctions as Civil or Criminal.

This Court has held that the stated purpose of the contempt sanction alone cannot be determinative. *Bagwell* at 828; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911). "[T]he label affixed to a contempt ultimately will not be allowed to defeat the applicable protections of federal constitutional law." *Bagwell* at 839; *Hicks v. Feiock*, 485 U.S. 624, 636 (1988). Determination of whether a sanction constitutes a civil contempt "coercive sanction" or a criminal sanction is determined by "an examination of the character of the relief itself." *Bagwell* at 827-829 citing *Hicks* at 636 and *Gompers* at 441. Accordingly, the "civil" contempt labels applied by the lower courts have no determinative effect.

In *Gompers*, the Court contrasted a civil contempt sanction as one which is remedial and for the benefit of the complainant, with criminal contempt wherein the penalty is punitive, to ***"vindicate the authority of the court."*** *Gompers* at 441 (emphasis added). Vindication of the bankruptcy court's authority was the sole purpose of the *per diem* sanctions as reflected by the district court's comments in its December 27, 1996 order:

> The Court has carefully reviewed the record, including the transcript of the underlying proceedings in the United States Bankruptcy Court, and finds the sanctions orders are proper and correct. Indeed, the orders show great restraint on the part of the Bankruptcy Judge. Feldman and Matz *have shown and continue to show complete disregard for Court orders and procedures. Such conduct cannot*

> *be tolerated* and the sanctions orders are affirmed in all respects and are fully enforceable.

Apx. 5 (emphasis added). There is nothing compensatory reflected in the italicized quotation.

Any argument that the subject *per diem* sanctions lost their criminal character because the bankruptcy court announced their possible imposition and amount prospectively has already been considered and summarily rejected by this Court:

> Respondent nevertheless contends that the trial court's announcement of a fine schedule allowed the union to avoid paying the fine[s] simply by performing the act required by the court's order . . . thus transformed those fines into coercive civil ones . . . the fact that the trial court announced the fines before the contumacy, rather than after the fact, does not in itself justify respondent's conclusion that the fines are civil or meaningfully distinguish these penalties from the ordinary criminal law . . . ***[the fines] are more closely analogous to fixed, determinate, retrospective criminal fines which petitioners had no opportunity to purge once imposed.*** We therefore decline to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law.

Bagwell at 836-837 (emphasis added).

In *Bagwell*, this Court recognized several distinct varieties of contempt, for which several different levels of constitutional protection attach. Direct contempts are those which take place in the presence of the court and immediately impair the court's ability to adjudicate. Indirect contempts take place outside of the presence of the court and therefore, merit greater constitutional protection.

(3) The *Per Diem* Sanctions are Premised Solely Upon an Indirect Contempt.

It is important to recognize that the contemptible conduct which gave rise to the ***per diem*** sanctions assessed by the bankruptcy court ***is not the same conduct*** which gave rise to the Injunction and Discovery Sanctions. The alleged contemptible conduct relevant to the *per diem* sanctions is the ***nonpayment*** of the Injunction and Discovery Sanctions. Nonpayment of those sanctions cannot constitute a direct contempt as a matter of law, because it did not occur in the court's presence and did not impair any court's ability to adjudicate.

(4) The *Per Diem* Sanctions are Punitive.

The record is clear that the only *compensatory* sanctions entered were the $11,950.00[3] awarded in connection with the Intermarque Sanctions and the $3,000.00[4] awarded

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[3] $11,950 is computed as $10,950.00 (Apx. 9) + $1,000.00 (Apx. 12, 15).

[4] $3,000.00 is computed as $2,000.00 (Apx. 19) (*i.e.*, $1,000.00 times two cases) + $1,000.00 (Apx. 22) (*i.e.*, $500.00 times two cases).

in connection with the MBM Sanctions. The forgoing awards were expressly assessed as attorney's fees and expenses. The punitive nature of the *per diem* sanctions is even more glaring, given that no further sanctionable conduct occurred, and the specific conduct which gave rise to the Injunction and Discovery Sanctions was not repeated or continued. Any suggestion that the *per diem* sanctions were merely "coercive" and not punitive is wholly without merit.

A frequently cited test for assessing the criminal/punitive nature of a sanction is whether it bears any relationship to the loss actually sustained by the complainant. A compensatory fine has traditionally been viewed as civil, while a noncompensatory fine is punitive and criminal in character. *N.L.R.B. v. Laborers' Int'l Union,* 882 F.2d 949, 955 (5th Cir. 1989) ("a ***civil contempt fine may not exceed the actual loss*** to the complainant caused by the actions of respondent, ***lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding.***") (emphasis added); *Boylan v. Detrio,* 187 F.2d 375, 379 (5th Cir. 1951) ("In civil contempt proceedings a punitive fine cannot be imposed . . . and where a fine is imposed, it ***must not exceed the actual loss*** to the complainant . . . [the] fine must be ***based on evidence of complainant's actual loss*** . . . appellees do not allege that they have suffered any loss or damage because of the acts of defendants charged, nor do they offer any evidence sufficient to prove that they have suffered any loss or damage because of any disobedience of any order or decree of the court. The order in civil contempt, therefore, may not stand.") (emphasis added); *Bernard v. American Cyanamid Co.*, 927 F.2d 411, 413 (8th Cir. 1991) ("Generally, a compensatory sanction ***may not exceed the actual loss to the complainant . . . lest the contempt fine become punitive in nature, which is not appropriate*** in a

civil contempt proceeding.") (emphasis added); *McDonald's Corp. v. Victory Invs.*, 727 F.2d 82, 87 (3rd Cir. 1984) ("a fine may be imposed payable to the complainant, but it ***must be based upon evidence of complainant's actual loss*** . . . [a fine] measured by the number of days which had passed in which Rappaport had failed to pay the counsel fees was more akin to a criminal fine than a coercive civil fine. It was evident that the fine was ***predicated on past acts*** of contempt rather than on continued failure to obey. . . .") (emphasis added); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983) ("To the extent the fine [$500.00 per day] was intended to be compensatory, the fine *must be based on Heritage's actual losses sustained as a result of the contumacy* . . . Here, Heritage points to ***no evidence in the record demonstrating any actual losses*** caused by the Shufflers' improper behavior [failure to pay $190,000.00 into an escrow account]. We cannot uphold the $500.00 per day fine as lost profits on the $190,000.00 . . . for the record is barren of any evidence to indicate that Heritage actually incurred a loss in profits . . . Nor is there any evidence in the record to support a finding that Heritage incurred actual damages in the amount of $500.00 per day in attorney's fees and costs as a result of the Shufflers' contumacy. Absent findings regarding Heritage's actual losses, the fine cannot be sustained as a compensatory remedy.") (emphasis added).

The record is devoid of evidence that the *per diem* sanctions served any compensatory function. To the contrary, the record clearly demonstrates that any compensatory purpose was separately and expressly addressed as outlined above. At no point did the bankruptcy court or the district court "attempt to calibrate the [*per diem*] fines to the damages" allegedly caused by Feldman's and Matz' conduct or "indicate that the *[per diem]* fines were to compensate

[Morgan] for losses sustained." *Bagwell* at 834. There is simply no evidence to demonstrate that the *per diem* awards were compensatory.

It is also well settled that a "coercive" civil fine is properly payable to the court and not the complainant. *Blaubergs v. Board of Regents*, 625 F.2d 1146, 1149 (5th Cir. 1980); *Granfinanciera, S.A. v. Nordberg*, 872 F.2d 397 (11th Cir. 1989) ("If the fine is coercive, it is paid into the court registry, not to the complainant."); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986) (compensatory contempt award is payable to complainant but coercive fine is not); *Winner Corp. v. H.A. Caesar & Co.*, 511 F.2d 1010 (6th Cir. 1975) ("*It would make little sense* to insist that fines for past contempt payable to the complainant be strictly based on evidence of actual damage, but to allow coercive fines, which are not calculated solely on the basis of the damage that violation of the decree would cause, to be paid to a private party. Contempt awards to private complainants are to be compensatory.") (emphasis added). Under the foregoing authorities, the *per diem* sanctions payable to Morgan cannot constitute "coercive" civil fines. The bankruptcy court's *per diem* sanctions are noncompensatory, punitive, criminal sanctions with no objective other than "vindicating the authority of the court."

(5) The *Per Diem* Sanctions Cannot be Purged.

In the lower Courts, Morgan relied on the following excerpt from *Bagwell* for the proposition that the *per diem* sanctions at issue constitute daily coercive civil sanctions:

> A close analogy to coercive imprisonment [which the Court earlier suggested was

> appropriate in certain circumstances] is a per diem fine imposed for each day a contemnor fails to comply with an affirmative court order. Like civil imprisonment, such fines exert a constant coercive pressure, and ***once the jural command is obeyed, the future, indefinite, daily fines are purged.***

Bagwell at 829 (emphasis added). The highlighted portion of the quote is the source of an analytical flaw.

Where a fine is not compensatory, it is civil ***only if*** the contemnor is afforded an opportunity to purge. *Bagwell* at 829. Each *per diem* sanction order in the instant case contained language that the *per diem* sanction would continue to accrue indefinitely if "***any sanction*** remains unpaid." (Apx. 12, 15, 22) (emphasis added) Therefore, under the express provisions of the bankruptcy court's orders, the only method available to Feldman and Matz to avoid further *per diem* assessments was: (i) payment in full of the underlying sanctions; together with (ii) payment in full of all accrued *per diem* sanctions. Stated differently, Feldman and Matz could not, under the express terms of the subject orders, pay the Injunction and Discovery Sanctions (*i.e.*, comply with the jural command) and thereby either avoid or stop the accrual of additional *per diem* sanctions. Feldman and Matz did not "carry the prison keys in their pocket."

Even though the conduct giving rise to the underlying sanctions had been remedied and the compensatory sanctions paid in full, the *per diem* sanction would continue to accumulate and punishment would continue to compound -- even in the absence of further sanctionable conduct. This is in direct contradiction to the concept of purging as discussed

in *Bagwell*. Under *Bagwell*, purging was clearly a procedure whereby the contemnor could comply with the jural command (in this case by paying the Injunction and Discovery Sanctions) and thereby terminate the coercive civil sanctions. *Bagwell* at 828-829.

Consistent with *Bagwell*, the Fifth Circuit has held:

> [S]ince sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance (with the prior court order), the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself.

Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974) citing *Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965). In the instant case, Feldman and Matz were never afforded an opportunity to purge (*i.e.* terminate) the *per diem* sanctions through simple compliance with the jural command.

(6) $204,750.00 Constitutes "Serious" Sanctions.

In determining whether the sanctions involved were "serious" criminal sanctions, in *Bagwell* this Court focused on the totality of the sanctions assessed. That is, the seriousness of the sanction must be evaluated at its end-point, not at its beginning and not at any incremental juncture. *Bagwell* held that a sanction of $52,000,000.00 was unquestionably a serious criminal contempt sanction. This Court did not focus its analysis on the amount of the individual prospective fines (*i.e.*, $20,000.00 for nonviolent infractions and $100,000.00 for violent infractions). Neither did this Court focus on a

particular incremental level of fines. Instead, it analyzed the question of "seriousness" from the perspective of the totality of the fines imposed against the union. Now this Court must evaluate not whether $8,000.00 or $10,950.00 or $18,950.00 constitutes a serious sanction; but instead, it must determine whether a $204,750.00 *per diem* sanction, imposed against two individuals, constitutes a serious sanction. Such amount is well beyond the $5,000.00 and $10,000.00 figures discussed in *Bagwell* as a possible threshold for "serious" criminal sanctions. *Bagwell* at footnote 5. Although in *Bagwell* this Court expressly reserved the question of where the monetary line between petty and serious sanctions should be drawn – at least as to individuals, $204,750.00 has clearly crossed that line.

(7) The *Per Diem* Sanctions Constitute Serious Criminal Sanctions.

The *per diem* sanctions levied against Feldman and Matz: (i) are premised on an indirect contempt; (ii) are punitive; (iii) could not be purged; and (iv) constitute serious sanctions under any reasonable definition. "That the order arose out of a civil case and was not rendered pursuant to a formal contempt prosecution initiated by the government . . . does not prevent it from being a criminal contempt." *Thyssen, Inc. v. S/S Chuen On*, 693 F.2d 1171, 1173 (5th Cir. 1982). Accordingly, for purposes of *Bagwell's* application, all elements necessary for an affirmative finding that the *per diem* sanctions constitute serious criminal sanctions are present. Indeed, every factor discussed in *Bagwell* mitigates against a finding that the sanctions in this case were "coercive civil sanctions."

Even if the characterization were less clear, where

both civil and criminal relief is imposed, the criminal feature of the order is dominant and fixes its character for purposes of review. *Bagwell* at 836. The Fifth Circuit has written:

> A contempt order is characterized as either civil or criminal depending on its primary purpose . . . when a contempt order contains both a punitive and a coercive dimension, for purposes of appellate review it will be classified as a criminal contempt order.

F.D.I.C. v. LeGrand, 43 F.3d 163, 168 (5th Cir. 1995); *Lamar Fin. Corp. v. Adams*, 918 F.2d 564, 567 (5th Cir. 1990). When there is uncertainty as to whether the contempt proceeding is civil or criminal, the judgment of contempt cannot stand. *Blaubergs* at 1149. Also, in *Thyssen* the Fifth Circuit stated:

> Our decisions have held that the ultimate test for determining the civil or criminal character of a contempt order is "the apparent purpose of the trial court in issuing the contempt judgment," a punitive purpose or one "designed to vindicate the authority of the court" establishing the criminal nature of the order, while a coercive or remedial purpose characterizes a civil contempt . . . We hold that the apparent purpose of the present order was punishment to vindicate the authority of the court, and that it was accordingly a criminal contempt order . . . Even if the order had, in addition to its apparent primary punitive purpose, also a secondary, remedial purpose, this would not serve to convert it from a criminal to a civil contempt. Our decisions have stated that where both

> purposes are present, the order is to be considered as criminal for purposes of review . . . As the punitive purpose is clearly dominant here, if not exclusive, we need not decide whether these authorities would apply where it is evident that the remedial or coercive purpose is heavily dominant . . . Our decisions have also held that a contempt order must be set aside if it cannot be determined with adequate assurance whether it is civil or criminal in nature.

Thyssen at 1173. Accordingly, the *per diem* sanctions ordered by the bankruptcy court constitute serious criminal sanctions which cannot be enforced.

(8) Serious Criminal Sanctions Require Criminal Due Process.

There can be no debate that due process protections attach to criminal proceedings. *Bagwell* at 826; *Hicks* at 632 (criminal penalties may not be imposed without the protections that the Constitution requires of such criminal proceedings). Because the *per diem* sanctions imposed by the bankruptcy court constituted criminal sanctions, Feldman and Matz were constitutionally entitled to full criminal due process protection.

(9) The Bankruptcy Court Violated Feldman's and Matz' Due Process Rights which Rendered all *Per Diem* Sanction Orders Void and Unenforceable.

There is no evidence in the record that either Feldman or Matz were given notice that they faced the possible imposition of serious criminal sanctions. *Bagwell* at 826;

LeGrand at 169; *Lamar* at 564. To the contrary, the proceedings below were consistently cloaked as civil contempt hearings, even though it now is clear that criminal contempt sanctions were being assessed. Additionally, the district court's comment that Feldman was "putting his liberty at risk" evidences the district court's belief that the proceedings involved something much more severe than ordinary civil sanctions. Likewise, there is no evidence in the record which suggests that the lower courts applied any standard of proof other than a "preponderance of the evidence." In a criminal proceeding, Feldman and Matz were entitled to proof beyond a reasonable doubt. *Young v. United States ex rel. Vuitton et Fils S.A.*, 41 U.S. 787, 798-799 (1987); *In re E.I. DuPont De Nemours & Co.*, 99 F.3d 363, 368 n.4 (11Cir. 1996), *cert. denied*, 118 S.Ct. 263 (1997); *In re Stewart*, 571 F.2d 958, 965 (5th Cir. 1978). Feldman and Matz were also entitled to have issues of criminal contempt tried to a jury. *Young* at 798-799, *DuPont* at 368, n. 4. There are no jury findings which underpin the bankruptcy court's criminal contempt findings and the district court did not even conduct an evidentiary hearing. Feldman and Matz were clearly denied their constitutional rights by both the bankruptcy court and the district court and such denials render the *per diem* sanction orders void and unenforceable.

C. The Underlying Bankruptcy Court Orders are Void for Want of Subject Matter Jurisdiction.

All lower federal courts are courts of limited jurisdiction. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). It is also well settled that the subject matter jurisdiction of bankruptcy courts does not extend to criminal contempt proceedings. *Griffith v. Oles*, 895 F.2d 1503, 1509 (5th Cir. 1990); *Eck v. Dodge Chem.*

Co., 950 F.2d 798, 802 (1st Cir. 1991). Accordingly, under the authorities previously cited, to the extent that the bankruptcy court imposed criminal contempt sanctions on Feldman and Matz, such orders were outside its subject matter jurisdiction and are void.

D. The District Court Cannot Affirm Void Bankruptcy Court Orders.

The record is unequivocal that: (i) no contempt proceedings were held before the district court; and (ii) the district court relied entirely on the proceedings in the bankruptcy court for the affirmation and entry of the $253,700.00 sanction order. (Apx. 3) It is fundamental that the district court cannot breath life into orders of the bankruptcy court which are void and unenforceable for the multiple reasons set forth above. Accordingly, the district court's January 14, 1997 order is void as a matter of law.

II. APPELLATE REVIEW OF THE UNDERLYING BANKRUPTCY COURT ORDERS IS NOT BARRED BY THE DOCTRINE OF *RES JUDICATA* BECAUSE THE BANKRUPTCY COURT CLEARLY USURPED THE CRIMINAL CONTEMPT POWER OF THE DISTRICT COURT.

It is well-settled that when a court engages in a "clear usurpation of power," collateral attack on its judgments or final orders is wholly permissible. *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 353-354 (1920) ("Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void,

and this even prior to reversal."); *United States v. Williams*, 341 U.S. 58, 66-67 (1951) (absence of certain essential jurisdictional facts renders the proceeding a nullity); *Noble v. Union River Logging R.R.*, 147 U.S. 165, 172-173 (1893) ("It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity . . . In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject matter (sic). The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding."); *Bass v. Hoagland*, 172 F.2d 205, 208-209 (5th Cir. 1949) (usurpation of power can form the basis of a collateral attack); *Wright v. Moffitt*, 146 B.R. 364, 369 (Bankr. S.D. Tex. 1992) (criminal contempt proceedings should be heard in the district court, not the bankruptcy court); *Commodities Export Co. v. Unites States Customs Serv.*, 957 F.2d 223, 227-228 (6th Cir. 1992) ("Were a substantial *public interest* to be undermined or an intentional and flagrant usurpation of judicial authority to be perpetuated by a *res judicata* determination, then there would be strong grounds for not giving preclusive effect to the jurisdictional determination."); *Nemaizer v. Baker*, 793 F.2d 58, 65 (2nd Cir. 1986) (usurpation of power can form the basis for a collateral attack); *Collins v. Foreman*, 729 F.2d 108, 111 (2nd Cir. 1984) ("a collateral attack upon [a] void judgment may be made in any proceeding in any court where the validity of the judgment comes in issue."); *Rochowicz v. United States*, 1993 U.S. Dist. Lexis 13168 (C.D. Cal. 1993) ("[W]here a court clearly lacks subject matter jurisdiction over a case, res judicata is inapplicable, and any judgment rendered by it is a nullity subject to collateral attack."); *Lester Mobil Home Sales, Inc. v. Woods*, 130 B.R. 204, 207 (W.D. Va. 1990) ("[C]ollateral attack of the judgment should be permitted 'if the subject matter of the action [in which the judgment was rendered] was so plainly beyond the

court's jurisdiction that its entertaining the action was a manifest abuse of authority.'"); *Maesch v. Maesch*, 761 F. Supp. 584 (S. D. Ind. 1989) (collateral attack is permissible where clear usurpation of power is present).

"A court will be deemed to have plainly usurped jurisdiction only when there was a total want of jurisdiction and no arguable basis on which it could have rested a finding that it had jurisdiction." *Nemaizer* at 65. The Fifth Circuit approved the *Nemaizer* approach in *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990). In the instant case, there was no arguable basis upon which the bankruptcy court could assert criminal jurisdiction for conduct which occurred outside its presence.

In *Durfee v. Duke*, 375 U.S. 106 (1963), this Court held:

> Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among factors appropriate to be considered in determining that collateral attack should be permitted are that
>
> (a) the lack of jurisdiction over the subject matter was clear;
>
> (b) the determination as to jurisdiction depended upon a question of law rather

than of fact;

(c) the court was one of limited and not of general jurisdiction;

(d) the question of jurisdiction was not actually litigated;

(e) the policy against the court's acting beyond its jurisdiction is strong.

Id. at 375. In the instant case: the bankruptcy court's lack of subject matter jurisdiction over criminal contempt matters was clear; the bankruptcy court's lack of subject matter jurisdiction was premised upon questions of law rather than fact; the bankruptcy court has very limited subject matter jurisdiction; the issue of jurisdiction was not litigated until it was raised by Feldman and Matz; and bankruptcy courts do not enjoy criminal subject matter jurisdiction.

The RESTATEMENT OF THE LAW, SECOND, JUDGMENTS § 12 contains a similar provision:

> When a court has rendered a judgment in a contested action, the judgment precludes the parties from relitigating the question of the court's subject matter jurisdiction in subsequent litigation ***except if:***
>
> (1) The subject matter of the action was ***so plainly beyond the court's jurisdiction*** that its entertaining the action was a manifest abuse of authority; or
>
> (2) Allowing the judgment to stand would

> ***substantially infringe the authority of another tribunal*** or agency of government. . . .

(Emphasis added). Again, in the instant case, criminal subject matter jurisdiction was plainly beyond the bankruptcy court's jurisdictional boundaries and the exercise of that jurisdiction substantially infringed on the authority of the district court. Accordingly, because the bankruptcy court imposed criminal contempt sanctions on Feldman and Matz, such orders were a clear usurpation of the district court's criminal contempt power, rendering the bankruptcy court's orders and all subsequent orders premised thereon subject to collateral attack.

III. VIOLATION OF THE TEXAS CONSTITUTION RENDERS THE CONTEMPT ORDERS VOID.

The Texas Constitution provides that "no person shall ever be imprisoned for debt." TEX. CONST. art. 1, § 18. Additionally, 28 U.S.C. § 2007(a) prohibits imprisonment for debt based on any process issued from a federal court, to the extent that state law prohibits imprisonment for debt. *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 242 (5th Cir. 1997); *Pierce v. Vision Invs.*, 765 F.2d 539, 543 (5th Cir. 1985), *vacated on other grounds*, 779 F.2d 302 (5th Cir. 1986).

Texas forbids the use of contempt proceedings to collect a judgment, regardless of whether a person is actually imprisoned or threatened with imprisonment, because a contempt judgment carries an "imminent threat of imprisonment for failure to comply with its terms." *Pierce* at 545; *Wallace v. Briggs*, 348 S.W.2d 523, 525-26 (Tex. 1961) (Judge has no authority to enforce a judgment of

attorneys' fees by contempt proceedings); *Ex Parte Dolenz*, 893 S.W.2d 677, 680 (Tex. App.--Dallas 1995, no writ) (Texas law does not allow collection of attorneys' fees by contempt proceedings); *Ex Parte Roan*, 887 S.W.2d 462, 464-65 (Tex. App.--Dallas 1994, no writ) (Texas law does not allow collection of attorneys' fees by contempt proceedings); *Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983) ("Texas courts have long considered contempt proceedings growing out of civil actions criminal or quasi-criminal in nature") *citing Ex parte Davis*, 161 Tex. 561, 344 S.W.2d 153, 155-56 (Tex.1961); *Ex parte Genecov*, 143 Tex. 476, 186 S.W.2d 225, 227 (1945); *Ex parte Scott*, 133 Tex. 1, 123 S.W.2d 306, 311 (1939). Although there are limited exceptions to the foregoing general rules, none apply to the instant case.

Texas has extended the full armor of due process rights to the non-indigent accused contemnor because of the criminal nature of the proceeding. *Ridgway* at 1413. The conduct prohibited by this long line of cases is precisely what the district court and bankruptcy court have done here; that is, the courts below have sought to collect a money judgment through the use of contempt sanctions. Based on the bankruptcy court's orders, the district court affirmed that Feldman and Matz were in contempt for failing to pay the Injunction and Discovery Sanctions. Additionally, the contempt proceedings in this case carried with them not only the imminent threat, but also, the actual threat of imprisonment. In its August 1, 1996 order, the district court specifically stated that failure to comply with its order "could result in a finding of contempt and . . . ***incarceration.***" The district court threatened Feldman's liberty once again in the one and only hearing (which was non-evidentiary) it convened before affirming the sanctions:

> This case is getting more complicated than I ever thought it could get to be. We now not only have Mr. Feldman with his ***liberty*** and his law license on the line, we have got another law firm risking its law license by getting involved in this matter.

(Emphasis added). Because the district court's use of contempt proceedings to collect a money judgment violates the Texas Constitution and corresponding federal law, its January 14, 1997 order is void and must be set aside.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 97-20098

IN THE MATTER OF: MBM INVESTMENT REAL ESTATE L P; IN THE MATTER OF: MATZ REAL ESTATE SERVICES, INC., IN THE MATTER OF: INTERMARQUE AUTOMOTIVE PRODUCTS, INC.

Debtors.

STEWART A. FELDMAN AND MARLA B. MATZ, D.D.S.,

Appellants-Cross-Appellees,

VERSUS

NIEL MORGAN,

Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(H-96-CV-2489)

Before DAVIS, JONES and DENNIS, Circuit Judges.

PER CURIAM:*

This appeal brings before us the propriety of the district

court's January 14, 1997 order directing the Feldmans to pay sanctions to Morgan in the amount of $253,700. This sanction followed the order of the bankruptcy court imposing sanctions that totalled $499,700. The district court has broad discretion to determine an appropriate sanction to obtain compliance with its order. The district court did not abuse its discretion in requiring Feldman to pay sanctions in the amount of $253,000.

Although Feldman complains of earlier orders issued by the bankruptcy court, he did not prosecute timely appeals from those orders and they are therefore not properly before us.

AFFIRMED.

*Pursuant to 5TH Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH Cir. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
STEWART FELDMAN	§	CIVIL ACTION
AND MARLA MATZ	§	NO. H-96-2489
SANCTIONS MATTERS	§	

ORDER

In accordance with the Court's order signed December 27, 1996, it is hereby

ORDERED that Stewart Feldman and Marla Matz, jointly and severally, shall pay sanctions to Niel Morgan in the total principal amount of $253,700.00.

IT IS FURTHER ORDERED that all principal and interest deposited into the Court's Registry in this case shall be paid to Niel Morgan, c/o Kirkendall & Isgur, 700 Louisiana, 48th Floor, Houston, Texas, 77002, (713) 225-4646, in partial payment of the sanctions award set forth herein. No additional deposits from Feldman or Matz will be accepted into the Registry.

IT IS FURTHER ORDERED that on or before February 3, 1997, Feldman and Matz shall either enter into an agreed payment plan with Mr. Morgan or pay the sanctions amount in full. Should neither the sanctions be paid nor an agreed payment plan be in place by February 3, counsel for Morgan is directed to advise the Court in writing. Feldman and Matz are advised that failure to comply with this order could result in a finding of contempt.

IT IS FURTHER ORDERED that this case is DISMISSED with the Court retaining enforcement jurisdiction.

SIGNED this 14th day of January, 1997, at Houston, Texas.

/s/ Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
STEWART FELDMAN	§	CIVIL ACTION
AND MARLA MATZ	§	NO. H-96-2489
SANCTIONS MATTERS	§	

ORDER

This sanctions matter is before the Court on various motions filed by Neil Morgan, the party to whom the sanctions are owed, and by Stewart Feldman and Marla Matz, the parties who owe the sanctions. The Court has carefully reviewed the record, including the transcript of the underlying proceedings in the United States Bankruptcy Court, and finds the sanctions orders are proper and correct. Indeed, the orders show great restraint on the part of the Bankruptcy Judge. Feldman and Matz have shown and continue to show complete disregard for Court orders and procedures. Such conduct cannot be tolerated and the sanctions orders are affirmed in all respects and are fully enforceable.

With reference to Morgan's request for appointment of a receiver for $170,000 held by Universal Surety following the reduction of a state court bond, the court notes that a purported attorneys lien was asserted by Sacks & Associates. At the hearing on August 20, 1996, counsel for the attorneys requested and obtained leave to file a pleading in support of their purported lien and in opposition to the use of the $170,000 as partial payment of the sanctions owed by Feldman and Matz. The Court notes the attorneys wisely elected not to pursue the purported lien by filing any further pleadings.

On August 30, 1996, Feldman deposited $10,000 into the Registry of this Court. As a result, the court finds the daily penalty should stop as of that date. Based on the foregoing, it is hereby

ORDERED that the sanction debtors' Motion to Modify, Vacate, Alter or Amend the sanctions orders (Entry #19) is DENIED and Morgan's Motion to Dismiss that motion (Entry #20) is GRANTED. Counsel for Morgan is directed to compute the total amount of sanctions owing as of August 30, 1996 and to advise the Court of that amount by January 7, 1997. An appropriate final order will be issued at that time.

SIGNED this 27th day of December, 1996, at Houston, Texas.

/s/ Norman W. Black
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
INTERMARQUE	§	CASE NO.
AUTOMOTIVE	§	93-45460-H4-11
PRODUCTS, INC.	§	

INTERMARQUE	§	
AUTOMOTIVE	§	
PRODUCTS, INC.,	§	
Defendant,	§	
VS.	§	
	§	
STEWART A. FELDMAN,	§	
Defendant,	§	
Counter-plaintiff and	§	ADVERSARY NO.
Third-party	§	93-4437
Plaintiff,	§	
VS.	§	
	§	
ROY I. BENNION AND	§	
NIEL C. MORGAN,	§	
Third-party	§	
Defendants.	§	

ORDER ENFORCING PERMANENT INJUNCTION

This Court has considered Niel Morgan's First Amended Motion to Enforce Permanent Injunction and Motion to Open Adversary Proceeding filed by Niel Morgan on July 20, 1995. After notice and hearing, the Court has determined that Stewart Feldman violated this Court's prior injunction.

1. On May 5, 1994, this Court issued its Final Judgment of Permanent Injunction Against Stewart a. Feldman (the "Permanent Injunction"). The Permanent Injunction is final and remains effective as of this date.

2. The following actions occurred after entry of the Permanent Injunction:

A. The filing of "Defendant's/ Counterplaintiff's Amended and Restated Counterclaim Against TCB; Crossclaimant's Matz' and Feldman's Original Crossclaim Against Individual and Partnership Crossdefendants; Notice of Lis Pendens: by Feldman in the United States District Court for the Southern District of Texas in cause number 95-0699 (the "First Complaint").

B. The filing of "Defendant's/Counterplaintiff's Amended and Restated Counterclaim Against TCB: Crossclaimant's Matz' and Feldman's Original Crossclaim Against Individual and partnership Crossdefendants; Notice of Lis Pendens" by Feldman in the 125th Judicial District Court of Harris County, Texas in cause number 94-57720 (the "Second Complaint").

C. The filing of "Defendant's/Counterplaintiff's Third Amended and Restated Counterclaim Against TCB; Crossclaimant's Matz' and Feldman's Original Crossclaim Against Individual and Partnership Crossdefendants; Notice of Lis Pendens" by Feldman in the 125th Judicial District Court of Harris County, Texas in cause number 94-57720 (the "Third Complaint').

D. The attempted prosecution of an appeal before the Court of Appeals for the First Judicial District Court of Texas in Cause number 92-07396 (the "Appeal").

3. At a minimum, sections seven and eleven of the First Complaint, the Second Complaint and the Third Complaint violate the Permanent Injunction issued by this Court.

4. The attempted prosecution of the Appeal was an attempt to prosecute claims that were enjoined by the Permanent Injunction.

5. Although the Permanent Injunction was violated, the violation was remedied, in part, by the issuance of a summary judgment against Feldman by the 125th Judicial District Court on the Third Complaint (the "Summary Judgment"). This Court has determined that the issuance of the summary judgment was appropriate at least as to those matters that violated this Court's Permanent Injunction.

6. Niel C. Morgan has incurred reasonable and necessary legal fees of at least $9,450.00 and reasonable and necessary expenses of $1,500.00 on the motion to enforce the permanent injunction and the mattes addressed therein.

Accordingly, the Court ORDERS as follows:

7. Feldman shall pay Niel C. Morgan the sum of $10,950.00 in cash on or before the thirtieth (30th) day after entry hereof.

8. Feldman may pursue an appeal of the Summary Judgment without further leave of this Court. In the event that Feldman prevails on the appeal of the Summary Judgment, he shall not proceed against Morgan without first obtaining leave

of this Court.

9. Feldman shall not file any lawsuit against Morgan, Notwithstanding the prohibition contained in this paragraph, Feldman may seek leave of this Court, by motion with notice to Niel C. Morgan, to file a lawsuit against Morgan. The motion shall contain a certificate from Feldman that the prospective claims (i) are unrelated to Intermarque; (ii) have not previously been decided by any court, and (iii) are not to be filed for the purpose of harassment. The certification shall be filed subject to Fed.R. Civ.P. 11.

10. The Court acquieces in an abetment of the Appeal pending a final appellate determination regarding the Permanent Injunction. Notwithstanding the foregoing, Feldman shall not violate this Order or the Permanent Injunction in his prosecution of the Appeal.

11. This Order is binding on Feldman, his attorneys, agents and assigns and all persons working in active concert with Feldman.

2/1/96 /s/ William Greendyke
Date United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
INTERMARQUE	§	CASE NO.
AUTOMOTIVE	§	93-45460-H4-11
PRODUCTS, INC.	§	

INTERMARQUE	§	
AUTOMOTIVE	§	
PRODUCTS, INC.	§	ADVERSARY NO.
	§	93-4437
vs.	§	
	§	
STEWART A. FELDMAN	§	

JUDGMENT OF CIVIL CONTEMPT

On May 10, 1996, this Court concluded an evidentiary hearing pursuant to the Court's order entered on March 22, 1996 requiring Stewart Feldman ("Feldman") to show cause why he should not be held in civil contempt of this Court. Feldman personally appeared at the hearing and admitted that he had failed to comply with this Court's prior order requiring Feldman to pay $10,950.00 in sanctions. The only defense offered by Feldman was that he was unable to pay the $10,950.00 in sanctions required by this Court's prior orders.

Since Feldman admitted his non-compliance with this Court's orders, the burden of proof for the affirmative defense of an inability to pay was on Feldman. After considering the testimony and the documents introduced on May 2, 1995, May

10, 1996 and May 16, 1996, the Court concludes that Feldman failed to sustain his burden of proof on the affirmative defense of inability to pay.

Based on the foregoing and for the reasons stated on the record in open Court on May 16, 1996, the Court orders as follows--

1. Stewart Feldman is in civil contempt of this Court.

2. In addition to the prior sanctions ordered by this Court, Feldman shall pay an additional $1,000.00 in compensatory sanctions to Niel Morgan. The $1,000.00 in additional sanctions shall be paid to Niel Morgan's counsel, Marvin Isgur, on or before 5:00 p.m. on the first day following entry of this Judgment of Civil Contempt.

3. In addition to the prior sanctions ordered by this Court and in addition to the $1,000.00 in additional compensatory sanctions referenced in the immediately preceding paragraph, Feldman shall pay additional, daily coercive sanctions for each day that any sanction remains unpaid. The first such additional, daily coercive sanction shall accrue at 5:01 p.m. on the first day following entry of this Judgment of Civil Contempt. Additional, daily coercive sanctions shall accrue at 5:01 p.m. each day that any sanction remains unpaid. Payment shall be to Niel Morgan's counsel, Marvin Isgur. All additional, daily coercive sanctions shall be payable immediately on their accrual. The amount of the first day's additional, daily coercive sanction shall be $250.00. The second day's additional, daily coercive sanction shall be $500.00. The third day's additional, daily coercive sanction shall be $1,000.00. The additional, daily coercive sanction for the forth day and for all succeeding days shall be $1,000.00 per day. Attached as Exhibit "A" to this

Order is a schedule showing the amount that will be due on each day shown on the schedule.

4. All payments required hereunder shall be made in cash or cashier's check drawn on a bank in Houston, Harris County, Texas to Marvin Isgur, 700 Louisiana, Suite 4800, Houston, Texas 77002. Payment shall be complete upon receipt.

5. The Court will not stay the effect of this Judgment of Civil Contempt. Unless this Judgment of Civil Contempt is stayed by the District Court, the Fifth Circuit Court of Appeals or the United States Supreme Court, Feldman shall comply with the terms of this Judgment of Civil contempt pending appeal.

Signed this 19th day of May, 1996.

/s/ WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	CASE NO.
INTERMARQUE	§	93-45460-H4-11
AUTOMOTIVE	§	(Chapter 11)
PRODUCTS, INC.	§	

INTERMARQUE	§	
AUTOMOTIVE	§	
PRODUCTS, INC.	§	ADVERSARY NO.
	§	93-4437
vs.	§	
	§	
STEWART A. FELDMAN	§	

AMENDED JUDGMENT OF CIVIL CONTEMPT

On May 10, 1996, this Court concluded an evidentiary hearing pursuant to the Court's order entered on March 22, 1996 requiring Stewart Feldman ("Feldman") to show cause why he should not be held in civil contempt of this Court. Feldman personally appeared at the hearing and admitted that he had failed to comply with this Court's prior order requiring Feldman to pay $10,950.00 in sanctions. The only defense offered by Feldman was that he was unable to pay the $10,950.00 in sanctions required by this Court's prior orders.

Since Feldman admitted his non-compliance with this Court's orders, the burden of proof for the affirmative defense of an inability to pay was on Feldman. After considering the testimony and the documents introduced on May 2, 1996, May 10, 1996 and May 16, 1996, the Court concludes that Feldman

failed to sustain his burden of proof on the affirmative defense of inability to pay.

This Amended Judgment of Civil Contempt amends and supersedes the Judgment of Civil Contempt entered on May 21, 1996 (the "May 21 Judgment"). Certain deadlines contained in the May 21 Judgment have now passed. Those deadlines are contained in this Amended Judgment of Civil Contempt for reference purposes.

Based on the foregoing and for the reasons stated on the record in open Court on May 16, 1996, the Court orders as follows-

1. Stewart Feldman is in civil contempt of this Court.

2. In addition to the prior sanctions ordered by this Court, Feldman shall pay an additional $1,000.00 in compensatory sanctions to Niel Morgan. The $1,000.00 of additional sanctions shall be paid to Niel Morgan's counsel, Marvin Isgur, on or before 5:00 p.m. on May 22, 1996.

3. In addition to the prior sanctions ordered by this Court and in addition to the $1,000.00 in additional compensatory sanctions referenced in the immediately preceding paragraph, Feldman shall pay additional, daily coercive sanctions for each day that any sanction remains unpaid. The first such additional, daily coercive sanction shall accrue at 5:01 p.m. on May 22, 1996. Additional, daily coercive sanctions shall accrue at 5:01 p.m. each day that any sanction remains unpaid. Payment shall be to Niel Morgan's counsel, Marvin Isgur. All additional, daily coercive sanctions shall be payable immediately on their accrual. The amount of the additional, daily coercive sanction accruing at 5:01 p.m. on May 22, 1996 shall be

$250.00. The amount of the additional, daily coercive sanction accruing at 5:01 p.m. on May 23, 1996 shall be $500.00. The amount of the additional, daily coercive sanction accruing at 5:01 p.m. on May 24, 1996 shall be $1,000.00. The additional, daily coercive sanction for all succeeding days shall be $1,000.00 per day. Attached as Exhibit "A" to this Order is a schedule showing the amount that will be due on each day shown on the schedule.

4. All payments required hereunder shall be made in cash or cashier's check drawn on a bank in Houston, Harris County, Texas to Marvin Iagur, 700 Louisiana, Suite 4800, Houston, Texas 77002. Payment shall be complete upon receipt.

5. Stewart A. Feldman, his attorneys, and all persons acting on Feldman's behalf, are enjoined from commencing any new lawsuit in the United States District or Bankruptcy Courts for the Southern District of Texas until such time as all amount due hereunder are paid in full. This injunction does not prohibit the commencement of a new lawsuit by *bona fide* entities owned or controlled by Feldman , which *bona fide* entities are asserting claims or causes of action on their own behalf. Notwithstanding the foregoing sentence, Feldman, his attorneys and all persons acting on Feldman's behalf are enjoined from transferring claims or causes of action to other entities with the effect of evading this injunction.

6. The Court will not stay the effect of this Amended Judgment of Civil Contempt. Unless this Amended Judgment of Civil Contempt is stayed by the District Court, the Fifth Circuit Court of Appeals or the United States Supreme Court, Feldman shall comply with the terms of this Amended Judgement of Civil Contempt pending appeal.

Signed this 3rd day of June, 1996.

/s/ WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
MBM INVESTMENT	§	No. 95-47987-H4-11
REAL ESTATE, L.P.	§	
	§	
and	§	
	§	
MATZ REAL ESTATE	§	No. 95-47986-H4-11
SERVICES, INC.	§	

ORDER

After notice and hearing this Court has considered Neil Morgan's Expedited Motion to Compel Compliance by Dr. Matz with Subpoena and for sanctions. During the hearing on March 29, 1996, the Court made extensive findings of fact and conclusions of law on the record in this matter which are incorporated herein. Based upon the evidence presented and the arguments of counsel, it is

ORDERED THAT:

Dr. Marla Matz, individually and in each of her corporate, partnership and agency capacities, shall produce all documents responsive to Neil Morgan's subpoena duces tecum dated March 8, 1996 at the offices of Stewart Feldman located at One Riverway, Suite 650, Houston, Texas 77056 at 3:00 p.m. (CST) on March 29, 1996 for inspection and copying. The document production shall continue until counsel for Neil Morgan has completed his review of the produced documents.

Stewart Feldman, individually and in each of his corporate, partnership and agency capacities, shall produce all documents responsive to Neil Morgan's subpoena duces tecum dated March 8, 1996 and the Notice of Deposition of Stewart Feldman dated March 25, 1996 at the offices of Stewart Feldman located at One Riverway, Suite 650, Houston, Texas 77056 at 3:00 p.m. (CST) on March 29, 1996 for inspection and copying. The document production shall continue until counsel for Neil Morgan has completed his review of the produced documents;

Counsel for Neil Morgan may select any or all of the produced documents for copying. A copying service shall take all documents identified by Niel Morgan's counsel for copying to its facilities for reproduction. The copying service shall return all originals to the offices of Stewart Feldman located at One Riverway, suite 650, Houston, Texas 77056. The copies shall be delivered by the copying service to the offices at Kirkendall, Isgur & Rothfelder, L.L.P., 700 Louisiana, 48th Floor, Houston, Texas. All copying charges shall be assessed as costs;

Sanctions in the amount of $4,000 are assessed jointly and severally against Dr. Marla Matz, Stewart Feldman, individually, and Stewart Feldman, counsel for Dr. Marla Matz, in Case No. 95-47987-H4-11;

Sanctions in the amount of $4,000 are assessed jointly and severally against Dr. Marla Matz, Stewart Feldman, individually, and Stewart Feldman, counsel for Dr. Marla Matz, in Case No. 95-47986-H4-11;

Dr. Marla Matz, Stewart Feldman, individually, and Stewart Feldman, counsel for Dr. Marla Matz, shall deliver a cashier's check in the amount of $8,000 payable to Marvin

Isgur at the offices of Kirkendall, Isgur & Rothfelder, L.L.P., 700 Louisiana Street, 48th Floor, Houston, Texas 77002 on or before 9:00 a.m. (CST), April 3, 1996;

The failure to pay timely all ordered sanctions and/or failure to produce documents as ordered above will result in (i) the striking of all pleadings filed by or on behalf of Dr. Marla Matz, Stewart Feldman, individually, or Stewart Feldman, counsel to Dr. Marla Matz, in the sanctions matter currently scheduled for hearing at 9:00 a.m. (CST) on April 3, 1996; (ii) the prohibition of any testimony by Dr. Marla Matz, Stewart Feldman, individually, or Stewart Feldman, counsel for Dr. Marla Matz, at the sanctions hearing scheduled for 9:00 a.m. (CST) on April 3, 1996 (iii) such other relief as the Court finds appropriate.

SIGNED this 29th day of March, 1996.

/s/ WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
MBM INVESTMENT	§	CASE NO.
REAL ESTATE, L.P.	§	No. 95-47987-H4-11
	§	
and	§	
	§	
MATZ REAL ESTATE	§	CASE NO.
SERVICES, INC.	§	No. 95-47986-H4-11

JUDGMENT OF CIVIL CONTEMPT

On April 24, 1996, this Court conducted an evidentiary hearing pursuant to the Court's order entered on April 17, 1996 requiring Stewart Feldman ("Feldman") and Marla Matz ("Matz") to show cause why they should not be held in civil contempt of this Court. Feldman and Matz personally appeared at the hearing and admitted that they had failed to comply with this Court's prior orders entered in the above referenced bankruptcy cases. The only defense offered by Feldman and Matz was that they were unable to pay the $8,000 in sanctions required by this Court's prior orders.

Since Feldman and Matz admitted their non-compliance with this Court's orders, the burden of proof for the affirmative defense of an inability to pay was on Feldman and Matz. After considering the testimony and the documents introduced on April 24, 1996, the Court concludes that Feldman and Matz failed to sustain their burden of proof on the affirmative defense of inability to pay.

Based on the foregoing and for the reasons stated on the records during the hearing on April 24, 1996, the Court orders as follows--

1. Stewart Feldman is in civil contempt of this Court.

2. Marla Matz is in civil contempt of this Court.

3. In addition to the prior sanctions ordered by this Court, Feldman and Matz shall, jointly and severally, pay an additional $500.00 in compensatory sanctions in case number 95-47986 and an additional $500.00 in compensatory sanctions in case number 95-47987. The $1000.00 in additional sanctions shall be paid to Niel Morgan's counsel, Marvin Isgur on or before 5:00 p.m. on May 20, 1996.

4. In addition to the prior sanctions ordered by this Court, and in addition to the $1,000.00 in additional compensatory sanctions referenced in the immediately preceding paragraph, Feldman and Matz shall pay additional, daily coercive sanctions of (i) $500 per day in case number 95-47986 for each day that any sanction remains unpaid; and (ii) $500.00 per day in case number 95-47987 for each day that any sanction remains unpaid. The first such additional, coercive daily sanctions shall accrue at 5:00 p.m. on May 20, 1996. Additional daily sanctions shall accrue at 5:00 p.m. each following day that any sanction remains unpaid. payment shall be to Niel Morgan's counsel, Marvin Isgur.

5. All payments required hereunder shall be made in cash or cashier's check drawn on a bank in Houston, Harris County, Texas to Marvin Isgur, 700 Louisiana, Suite 4800, Houston, Texas 77002. Payment shall be complete upon receipt.

6. The Court will not stay the effect of this Judgment of Civil Contempt. Unless this Judgment of Civil Contempt is stayed by the District Court, the Fifth Circuit Court of Appeals or the United States Supreme Court, Feldman and Matz shall comply with the terms of this Judgment of Civil Contempt pending appeal.

7. The Clerk is directed to enter this Judgment of Civil Contempt in case numbers 95-47986 and 95-47987.

Signed this 13th of May, 1996.

/s/ WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
MBM INVESTMENT	§	No. 95-47987-H4-11
REAL ESTATE, L.P.	§	
	§	
and	§	
	§	
MATZ REAL ESTATE	§	No. 95-47986-H4-11
SERVICES, INC.	§	

ORDER

On March 29, 1996, this Court directed Marla Matz and Stewart Feldman to pay $8,000.00 in sanctions to Niel Morgan and to produce certain documents to Niel Morgan. The Court ordered that failure to comply would result in sanctions including "(i) the striking of all pleadings filed by or on behalf of Dr. Marla Matz, Stewart Feldman, individually, or Stewart Feldman, counsel to Dr. Marla Matz, in the sanctions matter...[then] scheduled for hearing at 9:00 a.m. (CST) on April 3, 1996; (ii) the prohibition of any testimony by Dr. Marla Matz, Stewart Feldman, individually, or Stewart Feldman, counsel for Dr. Marla Matz, at the sanctions hearing [then] scheduled for 9:00 a.m. (CST) on April 3, 1996; and (iii) such other relief as the Court finds appropriate."

The April 3, 1996 hearing was continued until April 24, 1996. during that hearing the Court determined that Feldman and Matz did not pay the $8,000.00 in sanctions.

Niel Morgan separately sought relief in his "Motion to Enforce Order of March 29, 1996 and to Grant Relief Pursuant to FED.R. CIV. P.37(b)". No relief is granted to Morgan pursuant to his "Motion to enforce Order of March 29, 1996 and to Grant Relief Pursuant to Fed.R. Civ.p.37(b)".

Relief is granted to Morgan as a result of the failure of Feldman and Matz to pay the $8,000.00 in sanctions. Accordingly, it is ORDERED that--

1. All pleadings filed by or on behalf of Dr. Marla Matz, Stewart Feldman, individually, or Stewart Feldman, counsel to Dr. Marla Matz, in the sanctions motion filed by Niel Morgan on November 15, 1995, as supplemented, are stricken.

2. Dr. Marla Matz, Stewart Feldman, individually, and Stewart Feldman, counsel for Dr. Marla Matz, shall not be allowed to testify in their own behalf or to introduce controverting evidence in their own behalf in the sanctions motion filed by Niel Morgan on November 15, 1995, as supplemented.

5/14/96 /s/ WILLIAM GREENDYKE
DATE U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
MBM INVESTMENT	§	No. 95-47987-H4-11
REAL ESTATE, L.P.	§	
	§	
and	§	
	§	
MATZ REAL ESTATE	§	No. 95-47986-H4-11
SERVICES, INC.	§	

ORDER IMPOSING SANCTIONS
AND PERMANENTLY ENJOINING
CERTAIN BANKRUPTCY RELATED FILINGS

On May 10, 1996, this Court concluded a hearing on motions by Niel Morgan and Roy Bennion to impose sanctions as a result of these bad faith bankruptcies. Based on the evidence presented, this Court has concluded as follows:

A. The Court reaffirms its prior findings made in this case that these bankruptcies were commenced in bad faith.

B. Stewart Feldman was the driving force behind these bankruptcies. He was assisted by his wife, Marla Matz, who at all times had the ability to refuse to participate.

C. Following this Court's determination that these bankruptcies were filed in bad faith, Craig Cavalier cooperated fully with discovery. Accordingly, he should not be held liable for the full amount of sanctions awarded against Stewart Feldman and Marla Matz.

D. The reconstitution of MBM Investment Real Estate, L.P. was a sham transact undertaken at the direction of Stewart Feldman with the cooperation of Marla Matz.

E. Brad Beers has not engaged in sanctionable conduct in these bankruptcy cases and no award will be made against him.

F. The Court reaches no conclusion regarding whether Stewart Feldman or Marla Matz committed perjury on October 24th or 25th of 1995. Accordingly, no part of this sanction award is based on perjury allegations.

G. Niel Morgan incurred reasonable attorneys fees in the amount of $38,000.00 in connection with these bad faith bankruptcies. The Court has excluded from the amount of reasonable attorneys fees the amounts that were incurred in an effort to prove that Stewart Feldman or Marla Matz committed perjury.

H. Roy Bennion incurred reasonable attorneys fees in the amount of $11,000.00 in connection with these bad faith bankruptcies.

I. This Court has previously awarded $8,000.00 in sanctions in favor of Niel Morgan and against Marla Matz and Stewart Feldman. The $8,000.00 should serve as a credit against Morgan's attorneys fee. Accordingly, Morgan's net reasonable attorneys fees are $30,000.00.

J. This Court has the authority to award sanctions pursuant to Bankruptcy Rule 9011, 11 U.S.C. § 105 and the inherent authority of this Court.

K. This Court has the power, authority and duty to

regulate and control its docket.

L. On May 10, 1996, this Court announced that sanctions would be imposed against the two debtors. A review of the record reflects that no sanctions were sought against the debtors. Accordingly, this Order does not impose sanctions against the two debtors.

ACCORDINGLY, IT IS ORDERED THAT:

1. Sanctions in the amount of $5,000.00 are imposed in favor of Niel Morgan and jointly and severally against (i) Marla Matz, individually and as Trustee Of the Marla Matz, D.D.S., Inc. Money Purchase Pension Plan; (ii) Stewart A. Feldman; and, (iii) Craig Cavalier.

2. Sanctions in the amount of $4,000.00 are imposed in favor of Roy Bennion and jointly and severally against (i) Marla Matz, individually and as Trustee Of the Marla Matz, D.D.S., Inc. Money Purchase Pension Plan; (ii) Stewart A. Feldman; and, (iii) Craig Cavalier. This amount is in addition to the sanctions awarded in paragraph 1 hereof.

3. Sanctions in the amount of $25,000.00 are imposed in favor of Niel Morgan and jointly and severally against (i) Marla Matz, individually and as Trustee Of the Marla Matz, D.D.S., Inc. Money Purchase Pension Plan; and (ii) Stewart A. Feldman. This amount is in addition to the sanctions awarded in paragraphs 1 and 2 hereof.

4. Sanctions in the amount of $7,000.00 are imposed in favor of Roy Bennion and jointly and severally against (i) Marla Matz, individually and as Trustee Of the Marla Matz, D.D.S., Inc. Money Purchase Pension Plan; and (ii) Stewart A. Feldman. This amount is in addition to the sanctions

awarded in paragraphs 1, 2 and 3 hereof.

5. All of the foregoing sanctions shall be paid on or before 30 (thirty) days from the date of this Order.

6. The following entities are permanently enjoined from (i) filing a voluntary bankruptcy petition; (ii) filing or joining in an involuntary bankruptcy petition against any entity; (iii) filing a notice of removal pursuant to 28 U.S.C. § 1452; or, (iv) filing an adversary proceeding in the United States Bankruptcy Court:

(a) Stewart A. Feldman;

(b) Marla B. Matz;

(c) Any corporation in which Stewart A. Feldman owns any legal, beneficial or equitable interest, direct or indirect, of any size whatsoever;

(d) Any partnership in which Stewart A. Feldman owns any legal, beneficial or equitable interest, direct or indirect, of any size whatsoever, whether such interest is as a general partner, a limited partner, or otherwise;

(e) Any corporation in which Marla Matz owns any legal, beneficial or equitable interest, direct of indirect, of any size whatsoever; and,

(f) Any partnership in which Marla Matz owns any legal,beneficial or equitable interest, direct or indirect of any size whatsoever, whether such interest is as a general partner, a limited partner, or otherwise.

Any entity that is governed by this paragraph 6 may seek relief

from this injunction by filing an appropriate motion before this Court. Any entity that violates the injunction contained in this paragraph will be referred to the United States District Court for prosecution for criminal contempt. Such a referral will occur only if the Court determines that a violation has occurred after notice and hearing in accordance with then applicable law.

7. The Clerk is directed to enter the original of this Order in case number 95-47987 and a copy of this Order in case number 95-47986. The amounts set fourth herein are the total of the sanctions awarded in the two cases.

6/6/96
DATE

/s/ WILLIAM GREENDYKE
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20098

In The Matter of: MBM INVESTMENT REAL ESTATE L P;
In The Matter of: MATZ REAL ESTATE SERVICES, INC.,
In The Matter of: INTERMARQUE AUTOMOTIVE PRODUCTS, INCORPORATED

Debtors

STEWART A. FELDMAN; MARLA B. MATZ, D.D.S.
Appellants-Cross-Appellees,

V.

NIEL MORGAN,
Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC*

(Opinion 12/10/97, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, JONES and DENNIS, Circuit Judges.

PER CURIAM:

The petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

* This document contains a U.S. Court of Appeals file stamp dated January 29, 1998.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

April 21, 1998

Ms. Marla B. Matz
1002 Chimney Rock
Houston, TX 77056-2001

Re: Stewart A. Feldman and Marla B. Matz
v. Niel Morgan
Application No. A-782

Dear Ms. Matz:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on April 21, 1998, extended the time to and including June 26, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk

By /s/ Clayton R. Higgins, Jr.
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Stewart A. Feldman
Feldman & Associates
One Riverway, Suite 650
Houston, TX 77056-1903

Ms. Marla B. Matz
1002 Chimney Rock
Houston, TX 77056-2001

Mr. Marvin Isgur
Kirkendall & Isgur
700 Louisiana, Suite 4800
Houston, TX 77002

Clerk
United States Court of Appeals for
the Fifth Circuit
600 Camp Street, Room 100
New Orleans, LA 70130

Supreme Court, U.S.
FILED
AUG 27 1998
CLERK

No. 98-8

In The

Supreme Court of the United States

October Term, 1997

STEWART A. FELDMAN and MARLA B. MATZ, D.D.S.,

Petitioners,

vs.

NIEL MORGAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARVIN ISGUR
Counsel of Record
THOMAS KIRKENDALL
KIRKENDALL ISGUR & FOLTZ, L.L.P.
Attorneys for Respondent
700 Louisiana, Suite 4200
Houston, Texas 77002
(713) 225-4646

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II. STATEMENT OF FACTS

A. PRIOR PROCEEDINGS

This is the thirteenth of fourteen appeals that vexatious-attorney-litigant Stewart Feldman and his wife, Marla Matz, have filed to avoid complying with several orders of the United States Bankruptcy Court for the Southern District of Texas. The Feldmans' first twelve appeals were dismissed for want of prosecution or denied on their merits, and their fourteenth appeal is currently pending before the Fifth Circuit Court of Appeals. Nine of the Feldmans' fourteen appeals sought review of the same sanctions that are the subject of the Feldmans' petition to this Court. The following table sets forth the case number and disposition of the twelve appeals:

Appeal Civil Action Number	**Description**	**Status**
94-cv-1918	Appeal of Permanent Injunction	Affirmed on the merits.
95-cv-5660	Appeal of remand of removed cause of action	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
95-cv-5749	Appeal of remand of removed cause of action	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.

Appeal Civil Action Number	Description	Status
95-cv-5659	Appeal of lifting of automatic stay	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
95-cv-5750	Appeal of lifting of automatic stay	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
96-cv-1413	Appeal of imposition of $8,000 in sanctions for discovery and other abuse	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
96-cv-1414	Appeal of imposition of $8,000 in sanctions for discovery and other abuse	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
96-cv-1839	Appeal of civil contempt judgment for failure to pay $8,000 in sanctions	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.

Appeal Civil Action Number	Description	Status
96-cv-1840	Appeal of civil contempt judgment for failure to pay $8,000 in sanctions	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
96-cv-2473	Appeal of imposition of $30,000 in sanctions for bad faith filing	Dismissed. Appeal was not filed within jurisdictional time limits.
96-cv-0911	Appeal of $10,950 sanction for violation of permanent injunction	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.
96-cv-2065	Appeal of civil contempt judgment for failure to pay $10,950 sanctions	Dismissed; no brief filed or record designated in accordance with Bankruptcy Rules 8009 and 8006.

The Feldmans did not seek Circuit Court review of the twelve prior appeals after the United States District Court had dismissed or denied each of them. The Feldmans' pending fourteenth appeal seeks relief from the Fifth Circuit on virtually identical grounds as the relief sought in this petition.

After losing the twelve appeals, the Feldmans sought relief under FED. R. CIV. P. 60(b) in an effort to avoid the *res judicata* effect of the prior Bankruptcy Court orders. The District Court properly denied the Feldmans' Rule 60(b) motion, and that denial forms the basis of the Feldmans' petition.

B. ERRORS IN PETITIONERS' FACTUAL ALLEGATIONS

The following statements correct factual statements made by the Feldmans that are incorrect or otherwise misleading—

1. The Feldmans have not paid even the base sanctions. To date, Morgan has received a total of only $12,706.80. On page 10 of their petition, the Feldmans incorrectly allege that they have paid the base sanctions.

2. The Feldmans incorrectly allege that only $18,950 of the total sanctions were compensatory, but the record does not support that allegation. For example, on June 7, 1996, the Bankruptcy Court imposed $30,000 of compensatory sanctions against the Feldmans. Those sanctions have not been paid. Nevertheless, the $30,000 is incorporated in the $253,700 of total sanctions awarded against the Feldmans.

3. The Feldmans have remained in continuous violation of a series of orders of both the Bankruptcy and District Courts. Nonetheless, the Feldmans disingenuously argue on pages 9-10 of their petition that "the record" does not reflect that they engaged in any subsequent wrongdoing. Of course, the record does not so reflect—the record could not possibly reflect misconduct that continued *after* the date of the evidentiary hearings.

4. The Feldmans' inaccurately describe the underlying Intermarque state court litigation on pages 5-6 of their petition. However, that inaccuracy is irrelevant to whether the Feldmans were required to comply with the Bankruptcy Court's orders.

5. MBM is not the reconstituted successor to Chelan Associates and MRES is not its general partner. The Feldmans did file fraudulent papers with the Texas Secretary of State *claiming* that MBM was the reconstituted successor and *claiming* that MRES was the new general partner. The Bankruptcy Court concluded that the Feldmans' reconstitution attempt was a sham and a contempt of prior state court orders. Those Bankruptcy Court findings were the subject of one of the Feldmans' earlier appeals that has been dismissed. The Feldmans' misrepresentations regarding MBM and MRES are on page 7 of their petition.

6. The Feldmans imply that they merely failed to cooperate in discovery. For example, on page 8 of their petition, the Feldmans allege that the sanctions were imposed for the Feldmans' "alleged failure to comply with a Morgan subpoena." In fact, the Bankruptcy Court determined that Mr. Feldman assaulted and battered one of Mr. Morgan's attorneys during a document production session. In defending himself, Mr. Feldman testified that—had the events of the day occurred in Mr. Feldman's home—Mr. Feldman would have been justified in *shooting opposing counsel with a gun*. This outrageous conduct, as opposed to a claimed benign failure to comply with discovery, was the conduct that resulted in sanctions against the Feldmans. The Feldmans appealed the Bankruptcy Court's order, but did not prosecute the now-dismissed appeal.

7. Finally, the Feldmans do not advise this Court that the Bankruptcy Court conducted a series of hearings on whether the Feldmans had the financial ability to pay the base sanctions before the Bankruptcy Court imposed the *per diem* sanctions. Indeed, the Bankruptcy Court concluded on two separate occasions that the Feldmans had the ability to pay the sanctions. Although the Feldmans appealed those findings, they failed to prosecute those now-dismissed appeals.

III. ARGUMENT AND AUTHORITIES

A. THE FELDMANS' PETITION DOES NOT MEET THE STANDARDS OF SUPREME COURT RULE 10

The Feldmans allege that the Fifth Circuit's decision conflicts with prior decisions of other Circuit Courts and this Court. The Feldmans are wrong.

The Fifth Circuit's *per curiam* decision is a simple affirmation of the District Court's sanctions order based on (i) the broad discretion granted to a District Court to impose sanctions, and (ii) the Feldmans' failure to prosecute their multiple prior appeals of the sanctions imposed against them.

Supreme Court Rule 10 states that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Although the Feldmans allege that the Fifth Circuit committed error in its decision, they do not allege that the Fifth Circuit has misstated the law. Similarly, the Feldmans complain that the result in this case is inconsistent with prior decisions, but do not allege that the legal basis for the result is inconsistent with any Circuit Court's prior decision.

Moreover, the Feldmans argue that they should be allowed to relitigate matters now that the Feldmans have discovered the *Bagwell* decision. Under the Feldmans' interpretation of *Bagwell*, the results of the Fifth Circuit's decision in this case are inconsistent with the results that would have occurred had the Fifth Circuit applied the *Bagwell* decision properly. As explained below, the Feldmans are wrong about *Bagwell's* application to this case.

As set forth below, because of the adjudication of their prior appeals, *res judicata* precludes the consideration of the *Bagwell* issue in this appeal.

B. *RES JUDICATA* PRECLUDES THIS APPEAL

The Feldmans allege that *res judicata* cannot preclude a Rule 60(b) motion that is premised on an absence of jurisdiction or on a clear usurpation of power. The Feldmans are incorrect.

Under certain circumstances, a Rule 60(b)(4) motion can be used to mount a collateral attack of a void order. *Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986). For example, Rule 60(b)(4) allows a collateral attack following a default judgment when personal jurisdiction is challenged or when a litigant alleges that it was never served with process.

However, a Rule 60(b)(4) motion is subject to the same *res judicata* principles as any other requested relief. *Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986). Consequently, a litigant who participates in a federal lawsuit may not, on one hand, fail to protect that litigant's rights through an appeal of an adverse judgment and then, on the other hand, collaterally attack the judgment in subsequent proceedings. *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). This is true even if—as the Feldmans allege with regard to the Bankruptcy Court sanction orders—the original judgment was entered without due process. *Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730, 735 (5th Cir. 1984).

Consequently, so long as a party participates in litigation, the decision emanating from that litigation is final unless overturned on appeal. This is true even if a jurisdictional issue that was not raised in that litigation or a subsequent appeal might have otherwise rendered that decision void. This Court stated this principle fifty years ago in the following passage:

> It cannot now be broadly asserted that a judgment is always a nullity if jurisdiction of some sort or other is wanting. It is now held that, except in case of plain usurpation, a court has jurisdiction to determine

> its own jurisdiction, and if it be contested and on due hearing it is upheld, the decision unreversed binds the parties as a thing adjudged.

United States v. United Mine Workers of America, 330 U.S. 258, n. 57 (1947).

The principle established in *United Mine Workers* is commonly referred to as the "bootstrap" principle. The Third Circuit explained the principle in the following manner:

> [A] void judgment remains void until such time as jurisdiction is finally determined to exist, and, by virtue of the federal courts' 'jurisdiction to determine jurisdiction,' is elevated by its 'bootstraps' to the status of a valid judgment [citations omitted] or litigation of the issue is precluded by the doctrine of *res judicata*."

Page v. Schweiker, 786 F.2d 150, 154 (3d Cir. 1986).

The bootstrap principle has been concisely described in the following passage in regard to a voidness argument that is similar to that of the Feldmans' argument in their petition:

> [W]here the facts giving rise to subject matter jurisdiction have themselves been established in a federal court, that court's judgment is not subject to attack for voidness after the time for appeal has passed.

Vechione v. Wohlgemuth, 426 F.Supp. 1297, 1308 (E.D. Penn.), *aff'd.*, 558 F.2d 150 (3d. Cir.), *cert. denied*, 434 U.S. 943 (1977).

Accordingly, a collateral attack on a judgment based on an alleged lack of subject matter jurisdiction cannot be sustained. *Royal*

Ins. Co. of America v. Quinn-L Capital Corp., 960 F.2d 1286, 1293 (5th Cir. 1992). If the party against whom judgment was rendered elects not to appeal, then the judgment becomes final and the court's subject matter jurisdiction is insulated from collateral attack. *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1293 (5th Cir. 1992). This principle applies with equal force to bankruptcy court decrees. *Republic Supply v. Shoaf*, 815 F.2d 1046, 1053 (5th Cir. 1987).

Bankruptcy court orders have the same *res judicata* effect of other federal court orders. "The doctrine of res judicata applies with equal force to final judgments rendered by the bankruptcy courts and thus precludes relitigation in another bankruptcy proceeding and in other proceedings before Federal and State Courts." *In re Continental Airlines*, 145 B.R. 404, 409 (D. Del. 1992); *Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376-77 (1940).

Therefore, the Feldmans' argument that the Bankruptcy Court sanction orders are subject to continuous appeal and collateral attack is inconsistent with controlling authority. This Court stated the following long ago:

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has had his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision merely retries the issue previously determined.

Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

The Bankruptcy Court sanction orders do not remain subject to the Feldmans' continual attacks. A reviewing court will not

examine the underlying order when a party challenges the imposition of sanctions for that party's own non-compliance with such sanctions. *United States v. United Mine Workers of America*, 330 U.S. 258, 290-92 (1947). This Court recently explained the *United Mine Workers* decision in the following manner:

> In *United States v. Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947), we upheld a criminal contempt citation even on the assumption that the District Court issuing the citation was without jurisdiction over the underlying action. In that case, the question was raised on direct review and not collateral attack. We think the same concern expressed in these cases—the maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mistaken—justifies the conclusion that the sanction ordered here need not be upset.

Willy v. Coastal Corp., 503 U.S. 131, 137 (1992).

The Feldmans are not unique in their attempt to avoid an adverse judgment through a collateral attack. In 1931, this Court was confronted with a collateral attack on the issue of personal jurisdiction. Although the respondent had specially appeared, the trial court had found personal jurisdiction. A final and ultimately non-appealable judgment was entered. The respondent sought to avoid enforcement through a collateral attack on the original judgment in which he alleged an absence of jurisdiction. In rejecting the argument, this Court ruled as follows [citations omitted]:

> The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent. It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. That fact would

> be important upon appeal from the judgment, and would save the question of the propriety of the court's decision on the matter.... [The respondent] had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment, and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. It also had the right to appeal.... It elected to follow neither of these courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the results of the contest; and that matters once tried shall be considered forever settled as between the parties.

Baldwin v. Iowa State Traveling Men's Ass'n, 283 US 522, 524-25 (1931).

The *Baldwin* finality principles take on added importance when the Court is confronted with vexatious litigants such as the Feldmans. Mr. Feldman chose to violate the Bankruptcy Court order confirming Intermarque's Chapter 11 plan of reorganization. The Bankruptcy Court decided that those violations required the imposition of a permanent injunction against Mr. Feldman. Then, Mr. Feldman promptly violated the permanent injunction, and the Bankruptcy Court reasonably concluded that such violation justified the imposition of base sanctions. When Mr. Feldman elected not to pay the base sanctions, the Bankruptcy Court concluded that such non-payment justified the imposition of coercive daily sanctions. Rather than

prosecute his appellate rights, Mr. Feldman elected to ignore the imposition of the coercive daily sanctions.

Almost simultaneously with Mr. Feldman's violations of the permanent injunction, the Feldmans jointly chose to file two bad faith bankruptcy cases. The Bankruptcy Court imposed base sanctions against the Feldmans arising out of their conduct in the bad faith bankruptcy cases. Consistent with their contemptuous disregard for prior Bankruptcy Court orders, the Feldmans elected not to pay those base sanctions. After the Bankruptcy Court conducted another hearing and determined that the Feldmans were able to pay the new base sanctions, the Court imposed additional daily sanctions to coerce the Feldmans to comply.

The cumulative sanctions eventually grew to the $253,700 sanctions amount. Now, the Feldmans collaterally attack the underlying judgments that arose from their misconduct. In the end, the Feldmans' arguments are an inadequate façade that cannot mask their ultimate failure to accept personal responsibility for their misconduct.

Res judicata is designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). It is not "a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts...." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917). *Res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). "[I]ts enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if ... conclusiveness did not attend the judgments of such tribunals." *Nevada v. United States*, 463 U.S. 110, 129 (1983). In keeping with those long-established principles, the Feldmans should be compelled to comply with the sanction orders.

The Feldmans rely on a series of old Supreme Court decisions to rationalize their failure to comply with the sanction orders. However, the law concerning the *res judicata* effect of jurisdictional decisions significantly evolved during the 1930's. Since that time, jurisdictional decisions have been entitled to the same *res judicata* effect as any other court decision.

The Supreme Court authorities that the Feldmans cite reflect the evolution of the law. *Valley v. Northern Fire & Marine Ins. Co.* held that a bankruptcy court could not obtain subject matter jurisdiction over an insurance company when the statute explicitly prohibited jurisdiction. *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920). In *Valley*, there had been no prior challenge to the court's jurisdiction. The ultimate question in *Valley* was whether the jurisdictional question could be raised *for the first time in a collateral attack*. Following *Valley*, this Court ruled that jurisdictional questions were subject to *res judicata* after they have been litigated. *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). In this case, the Bankruptcy and District courts determined that jurisdiction existed, the Feldmans lost twelve appeals, and they now seek to reconsider the long-since determined jurisdictional issue. *Valley* is inapposite.

The Feldmans also rely on *United States v. Williams*, 341 U.S. 58 (1951). *Williams* was a perjury case in which this Court held that perjury in a trial court—even in the absence of jurisdiction by the trial court over the underlying crime—was still perjury before a competent tribunal. *United States v. Williams*, 341 U.S. 58, 65-66 (1951). The Feldmans rely on a "sound bite" from *Williams*. That snippet merely provides that certain essential facts must exist for a court proceeding to avoid being rendered a nullity. The Court described those circumstances as rare and did not find them present in *Williams*.

The Feldmans suggest that the United States District Court lacked jurisdiction to impose sanctions for wrongful behavior in a

bankruptcy case that the Feldmans commenced in that District Court. Perhaps the Feldmans can argue that the trial court was wrong, but their argument deteriorates into absurdity when they assert that the District Court had no power over the proceedings and the litigants before the District Court.

The next Supreme Court decision that the Feldmans rely upon regarding the alleged absence of *res judicata* is *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893). *Noble* was decided long before the development of modern case law regarding jurisdictional issues. Nevertheless, in *Noble* this Court held that the Secretary of the Interior was bound by the prior administrative decisions of his predecessor. In dicta, this Court described that a decision by a court without jurisdiction was a nullity. But *Noble* did not deal with the *res judicata* effect of a jurisdictional decision.

The final Supreme Court decision that the Feldmans cite on the *res judicata* issue is *Durfee v. Duke*, 375 U.S. 106 (1963). *Durfee* was decided after *Stoll*, and reaches the *opposite* conclusion from the one that the Feldmans attribute to the decision. In *Durfee*, the issue was whether subject matter jurisdiction was *res judicata* or subject to collateral attack. *Durfee* rejected the argument that the Feldmans use in this case and held that subject matter jurisdiction was subject to the same *res judicata* effect as any other determination by a court of competent jurisdiction. *Durfee v. Duke*, 375 U.S. 106, 111 (1963). The Feldmans wrongly claim that the *Durfee* Court made the statement attributed to the Court on pages 26 and 27 of the Feldmans' petition. In fact, the *Durfee* Court excerpted the "quotation" from the RESTATEMENT OF CONFLICT OF LAWS (1948) and the RESTATEMENT OF JUDGMENTS (1942). The Court did not follow the Restatements' position. Indeed, both Restatements have now been revised to reflect the evolutionary change that occurred during the 1930's. For example, the RESTATEMENT OF JUDGMENTS now explains that:

> When the question of the tribunal's jurisdiction is raised in the original action, in a modern procedural

> regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion. The force of the considerations supporting preclusion is at least as great concerning determinations of the issue of jurisdiction as it is with respect to other issues.

RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982).

C. THE PER DIEM SANCTIONS ARE COERCIVE CIVIL SANCTIONS

Even if *res judicata* did not resolve this appeal, the Feldmans' substantive argument is inadequate to support it. The Feldmans' argument is premised on the following syllogism—

- Large sanctions awards are, by definition, criminal in nature.
- The daily sanctions imposed by the Bankruptcy Court grew to $253,700.
- $253,700 is a large sanction.
- Therefore, the daily sanctions imposed by the Bankruptcy Court must be criminal sanctions.

Inasmuch as criminal sanctions may not be imposed in a civil contempt proceeding, the Feldmans conclude that the sanctions are unenforceable.

The initial problem with the syllogism is that it treats the daily sanctions as a single, impermissible, lump sum award of $253,700. In fact, the daily sanctions accrued at a rate of only $1,000 per day. The question should be whether each $1,000 daily sanction was, in fact, criminal.

On a threshold basis, the Feldmans' argument lacks substance. According to the Feldmans' logic, any litigant faced with daily fines could simply (i) ignore the daily sanctions by failing to pay them; (ii) wait until the daily sanctions grew to become "large"; and (iii) after the passage of sufficient time, claim that the now large sanctions must be criminal sanctions and unenforceable.

The Feldmans' argument misses the mark badly. When daily sanctions are imposed for a coercive purpose, they will be upheld even if the passage of time results in large sanctions. For example, the imposition of coercive sanctions of $1,000,000 per day against the City of Yonkers was not "an abuse of discretion ... as a means of insuring compliance" with the District Court's order. *Spallone v. United States*, 493 U.S. 265, 276 (1990). The fines against the City of Yonkers grew to $1,000,000 per day after Yonkers refused to comply with the District Court order for fifteen consecutive days. *Spallone v. United States*, 487 U.S. 1251, 1257 (1988) (Marshall, J., concurring).

The Feldmans place substantial reliance on this Court's *Bagwell* decision. *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). However, *Bagwell* is not Feldman. In particular, the conduct in *Bagwell* required fact findings to determine whether violations of a broad order had occurred. In *Bagwell*, the trial court imposed fines for conduct that required discovery, evidence and witnesses to determine whether violations had, in fact, occurred. The trial court denied the union a jury trial and determined disputed fact issues without a jury. This Court described the trial court's orders as "complex injunctions often requiring elaborate and reliable factfinding." *Bagwell* at 833-34.

Conversely, the Feldmans' conduct was not disputed and was directly related to abuses of the civil justice system. The original sanctions were imposed against the Feldmans for their failure to comply with the litigation standards of a civilized society. When sanctioned for their conduct (such as Mr. Feldman's assault on a

member of the bar), the Feldmans elected not to pay the required discrete sanctions. They admitted this misconduct. As this Court stated in *Bagwell:*

> Courts traditionally have broad authority through means other than contempt... to penalize a party's failure to comply with the rules of conduct governing the litigation process. See, e.g., Fed.Rules Civ.Proc. 11, 37. Such judicial sanctions never have been considered criminal, and the imposition of civil, coercive fines to police the litigation process appears consistent with this authority.

Bagwell at 833.

In *Bagwell,* this Court recognized that coercive sanctions were civil in nature when the jural command was to "enforce orders compelling or forbidding a single, discrete act." *Bagwell* at 835. In this case, the Feldmans were merely commanded to pay sanctions that they had the financial ability to pay. Consequently, *Bagwell* does not render the Feldmans' sanctions criminal in nature.

Furthermore, the *Bagwell* Court specifically distinguished *Bagwell's* prospective fines that would be imposed if future wrongful conduct occurred from "coercive day fines" such as those used by the trial court to coerce the Feldmans. *Bagwell* at 837.

Although previously challenged to do so, the Feldmans are unable to explain why their repeated, daily violations of the Bankruptcy Court's orders should be tolerated. If vexatious litigants could ignore daily sanctions until the sanctions grew to a large amount, then courts would have no effective remedy (short of imprisonment) to coerce a contumacious litigant into compliance with the court's orders. Such a result would be contrary to sound public policy and the efficient administration of justice.

IV. CONCLUSION

The Feldman's petition fails to state a sufficient reason to grant a request for a *writ of certiorari* to the United States Court of Appeals for the Fifth Circuit. As with many vexatious litigants before them, this lawyer-husband-and-wife team believes that it can ignore an avalanche of adverse decisions while repeatedly relitigating a technical legal issue. This Court should uphold the rule of law and decline further consideration of this matter.

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